Supreme Court, U.S.
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No.

IN THE
UNITED STATES SUPREME COURT

CLARENCE JAY LYNCH,
Petitioner,

v.

GENE JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Should State habeas petitioner be allowed benefit of tolling when delay is caused by conditions beyond his control? Would subsequent denial of tolling violate petitioner's 14th amendment due process rights when petitioner substantially complied with filing requirements?

2. Should federal habeas petitioner be allowed benefit of tolling when delay is caused by conditions beyond his control? Would subsequent denial of tolling violate petitioners due process rights when petitioner substantially complied with filing requirements?

3. Were the defendant's fourteenth amendment due process and sixth amendment counsel rights violated when the trial court allowed defendant to represent himself at trial when defendant had demonstrated incompetence in this capacity before the court in an earlier mistrial?

4. Upon declaration of mistrial, should judge have recused in second trial when basis for mistrial was animosity between defendant and judge? Would second trial deny defendant a fair trial free from impartiality when trial proceeds against defendant's objections?

5. Is a defendant who is denied defense of choice denied a constitutionally fair trial?

6. Was sentencing counsel ineffective for falling to argue sentence option, which would have reduced client's sentence by nearly 90% when client qualified for reduction?

Parties to Proceeding

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Opinions of the Virginia Circuit Court, the Virginia Supreme Court, the United States District Court, and the United States Court of Appeals for the Fourth Circuit appear at Appendix A-I.

BASIS OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied appeal in this matter originally brought under 28 U.S.C. § 2254. Clarence Jay Lynch v. Gene Johnson, Director etc., 05-7815/CA-05-480 on April 23, 2006. This Court has approved an extension of time to file petition for writ of certiorari until on or before September 24, 2006.

Jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, § 9, cl. 2.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

U.S.Constitution, Art. III, § 1.

The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed []; and to have the Assistance of Counsel for his defense.

U.S. Constitution, Amendment XIV §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2244.

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless

(B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to a judgment of a State court. The limitation shall run from the latest of--

(B) The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Code of Virginia § 18.2-248.1 (1950).

Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana. -- Except as authorized in this Drug Control Act, Chapter 34 of Title

54 [illegible] shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give, or distribute marijuana.

(a) Any person who violates this section with respect to:

(3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five or more that 30 years.

If such person proves that he gave, distributed or possessed with intent to give or distribute marijuana only as an accommodation to another individual and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the marijuana to use or become addicted to or dependent upon such marijuana, he shall be guilty of a Class 1 misdemeanor.

(c) Any person who gives, distributes or possesses marijuana with the intent to manufacture such substance, not for his own use is guilty of a felony punishable by imprisonment of not less than five nor more than 30 years and a fine not to exceed $10,000.

Code of Virginia § 8.01-654 (1950).

(A)(2) A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

STATEMENT OF THE CASE

This case arose on September 9, 1999, when Roanoke City Police Officers executed a search warrant of Petitioner Lynch's residence. Lynch was ultimately indicted for the manufacture of marijuana not for his personal use in violation of Virginia Code § 18.2-248.1(c).

Pretrial suppression motion was made by Lynch through counsel. Lynch argued that the marijuana found in his residence should be excluded for two reasons, both undermining probable cause for the issuance of a search warrant: (1) the tip to police from a concerned citizen was uncorroborated and (2) thermal imaging was employed to support probable cause along with the anonymous tip of this concerned citizen. Lynch argued that individually neither one of these two sets of facts would have gone to support probable cause independently, stacking them together would not meet the threshold either.

The issue was taken on to direct appeal, especially in light of a contemporaneous Supreme Court holding that the employ of a thermal imaging device to support probable cause created a presumption of an unreasonable search. Kyllo v. United States, 533 U.S. 27 (2001). The court disagreed with Lynch. In the view of the trial court, the exception in United States v. Leon applied, allowing police to execute an otherwise flawed search warrant and preserve evidence for trial where the warrant was gained by police in good faith. 468 U.S. 897 (1984); LTR. OPIN. dated, 05/23/00. The Court of Appeals disagreed with Lynch, affirming the decision of the trial court. Commonwealth v. Lynch, 39 Va.App. 89, 570 S.E.2d 871 (2002)

Subsequent to the suppression hearing two significant events transpired. First, Lynch decided to represent himself at trial, without the assistance of counsel; and second, another judge was assigned to the case just prior to the start of trial. Judge Jonathan M. Apgar was replaced with Judge Robert P. Doherty. Against continuous objection from the defense, the trial continued as scheduled. (T.Trans. 02/06/01 at 24). Lynch objected to the change to this new judge because of an alleged conflict of interest between Lynch and the new Judge Doherty, and Lynch argued that the change represented a conflict with Virginia Code § 17.1-501. (Id. at 21-22).

Lynch's primary focal point in making his complaint was judicial bias. It was Lynch's contention that Judge Doherty was biased against him personally. This the case, Lynch believed his right to a fair trial would be compromised by the continued presence of this judge.

The first trial ended in a mistrial. Judge Doherty held Lynch in contempt of court and sentenced him to 10 days in jail. (T.Trans. 02/14/01). At the retrial, Lynch again objected to Judge Doherty presiding, the objection was again overruled. Throughout these proceedings, neither the Commonwealth nor the Court offered any explanation for the failure of Judge Apgar to take the case in retrial despite his apparent availability to do so. (T.Trans. 04/12/01 at 11-13).

At the new trial the Commonwealth introduced evidence seized pursuant to the contested search warrant. It also offered testimony of two expert witnesses whose testimony was that the marijuana found was inconsistent with personal use. At the close of the Commonwealth's

case, Lynch moved to strike the evidence. The motion was denied. (T.Trans. 04/03/01 at 89-92).

Mr. Lynch had suffered long-term pain from an old back injury. Lynch had gone into the trial prepared to present an affirmative defense to explain that the marijuana's intended use was as medication for Lynch's chronic back pain. The trial court would not allow this defense and frustrated Lynch whenever he attempted to present evidence of this to the jury, nor did the court instruct the jury on the accommodation defense. (T.Trans. 04/03/01 at 100-101).

The jury convicted Lynch of the charged offense. The court sentenced Lynch to a 10-year term of imprisonment recommended by the jury, and further attached a maximum $10,000 fine. (T.Trans. 04/03/01 at 164).

Direct appeal brought claims of:

(1) Whether the trial court erred in denying Lynch's motion to suppress the fruits of the search of his residence when the search warrant was based upon the anonymous tips of informants whose reliability was not established, and upon the use of a thermal imaging device surveillance; (2) whether the trial court erred in denying Lynch's motion for recusal over the conflict of interest; in particular, the conflict created by Judge Doherty presiding over the first trial, the contempt hearing, and the second trial when another judge was available; (3) whether manifest injustice existed in the presentation of expert testimony that the quantity of marijuana involved would be inconsistent with personal use; and (4) whether

there was sufficient evidence that the defendant manufactured marijuana not for personal use. The matter was denied by the Virginia Court of Appeals on October 15, 2002 via published opinion. Commonwealth v. Lynch, 570 S.E.2d 871 (Va.App. 2002). Mandate from the Virginia Supreme Court was issued on March 5, 2003. (No. 02-2611).

Federal habeas corpus followed under 28 U.S.C. § 2254. (No. 7:03cv00230 W.D. Va.). At this juncture two claims were brought by counsel for Lynch: (1) That the court erred in denying Lynch's motion to suppress the marijuana evidence when such evidence was gained by anonymous tips of untested informants and the employ of a thermal imaging device, and (2) that the trial court erred in its refusal to recuse. This habeas corpus petition was denied on 07/22/03. The Fourth Circuit Court of Appeals denied a certificate of appeal ability on 01/09/04. (Record No. 03-7270).

During this entire period of time from sentencing onward to his appeal of the habeas action in the Court of Appeals at the federal level, Lynch was held either in the local Roanoke City jail or in the Virginia Department of Corrections receiving unit where, in both locations, necessary information concerning state and federal filing requirements for post-conviction actions were not available to him. Nor did his counsel at any time inform him of any requirements or limitations, or explain the difference between a direct appeal and a petition for habeas corpus. As far as Lynch knew, the federal action was nothing more than a continuation of his direct appeal to a federal level. Requests for information from state officials in this time also proved negative.

Once Lynch received word that his appeal was denied at the federal Court of Appeals level, Lynch was transferred to a Virginia prison and assigned to the general population. It was not until this time that Lynch was able to access regular law library facilities there. It was not until this time that Lynch was able to begin his understanding of the state of affairs of his legal battle. There, he was to learn the difference between direct appeal and habeas corpus, and it was only after the state time limitations had expired, and the first habeas petition had been filed in federal court barring any second petition that he was able to discover this very vital information.

Once he was aware of this he immediately filed for state post-conviction relief under Virginia Code § 8.01-654. In the state habeas corpus petition, Lynch raised the following claims:

(1) That it was a violation of defendant's right to due process under the Virginia and U.S. Constitutions when the trial court allowed the defendant to proceed without counsel and to represent himself at trial, when waiver of counsel was not knowingly or intelligently entered under the law and defendant was incompetent to act in capacity of counsel, court abused its discretion to the prejudice of the defendant.
(2) It was an error and a violation of defendant's due process protections under both the Virginia and U.S. Constitutions for trial to continue against the defendant's objections protesting the judge's display of clear bias against the defendant.
(3) Defendant was denied a fair trial before an impartial, neutral jury when the defense was

denied the opportunity to present evidence supporting an affirmative defense posture, defense was denied right to jury by court's refusal to allow jury instruction on affirmative defense and defense of accommodation, further denying due process.

(4) Counsel on appeal was ineffective under the Sixth Amendment when counsel failed to argue the due process and jury violations on direct appeal.

(5) Counsel was also ineffective for failing to argue the defense of accommodation on behalf of his client at sentencing thereby converting his felony conviction into that of a misdemeanor.

The Commonwealth responded in defense to this action that Lynch was time-barred from filing his petition. Lynch argued that the timing was correct if the court would consider equitable tolling of any overage in filing times.

In support of this position Lynch gave evidence of his incarcerated state, he explained the special housing circumstances existing at the jail and in the receiving unit at the Department of Corrections, and elucidated on the limits these placed upon his access to legal information crucial to filing, and Lynch explained how counsel had filed a federal post-conviction action instead of a state action first, all directly interfering with his ability to properly place his issues squarely before a court of competent jurisdiction in the timely manner required by statute and showing how he was entirely reliant upon the word and advice of third parties for his information about filings in court.

In this case those third parties were the operators of the City Jail where Lynch was originally held, the operators of the Department of Corrections Receiving Unit at Powhatan, and his lawyers Anthony Anderson, Melissa Friedman, and later, Harvey J. Lutins. Lynch also argued that any failure on the part of the state to allow equitable tolling in this matter would effectively deny him access to the writ of habeas corpus in violation of constitutional guarantees. He argued that tolling should have applied especially during the period when his federal habeas corpus was pending, and that to do otherwise violated the spirit of the limitations period. In spite of this however, the Circuit Court for the City of Roanoke denied Lynch's petition on September 17, 2004.

Lynch, however, did take a lead from this Court's decision in Gonzales v. Crosby, 545 U.S., 125 S.Ct. 2641 (2005), and filed a motion under Rule 60(b), confining his argument to the procedures that were employed to deny his federal and state habeas corpus petitions. Federal Rules of Civil Procedure, Rule 60(b)(6).

The District Court denied this motion on 07/06/06. (Civil Action No. 7:05cv00480). Appeal of this denial is currently pending with the Fourth Circuit Court of Appeals. (Record No. 06-7223).

STATEMENT OF THE FACTS

Local police raided Mr. Lynch's home on September 9, 1999. The police executed a search warrant for illegal marijuana. Tips of anonymous and unreliable informants, and the aid of a thermal imaging device

supported the probable cause. The police discovered marijuana growing and in various stages of harvest throughout the residence. Lynch protested the search pretrial on grounds that probable cause was deficient. Despite Lynch's protests of illegal search Lynch faced trial with the seized marijuana used to aid the prosecution's case in chief anyway.

Mr. Lynch's first trial ended in mistrial. In both the first and second trial, Lynch proceeded in both instances pro se, without counsel.

Petitioner Lynch was ultimately convicted in a second jury trial before a Virginia circuit court of the charged offense, a felony of manufacturing marijuana not for his personal use. Virginia Code § 18.2-248.1(c); (City of Roanoke Circuit Court, # CR-99-001615, July 2, 2001). Evidence in this case did not show at any time that Lynch made any profit or gain what so ever from the marijuana growing in his home.

Under Virginia law an exception does exist in particular circumstances to reduce the level of offense from a felony to that of a Class 1 misdemeanor. Lynch, being a novice in law, knew nothing of this exception. Lynch did hire counsel for the sentencing hearing, but apparently counsel missed the exception also. As a result, Lynch was not able to benefit from this statutory bonus and was therefore sentenced to the 10-year jury-recommended term of imprisonment a felon who grows marijuana for profit would receive instead of the 1-year or less deserving of the misdemeanant.

Lynch appealed his case directly raising issue about the search, and about a bias the trial judge had toward

Lynch personally. It was this bias that Lynch believed had tilted the balance against him at trial. This matter was brought before the appellate court to no avail. Lynch's appeal was denied in a published opinion. Commonwealth v. Lynch, 570 S.E.2d 871 (Va.App. 2002). Virginia Supreme Court denied his appeal. (No. 02-2611, March 5, 2003).

Lynch's counsel then proceeded with a filing for federal habeas corpus on the issues claimed in the state appellate courts. This avenue also failed for Mr. Lynch. Counsel never advised Lynch of what he would forfeit should be proceed directly to federal habeas corpus after direct review at the state level, bypassing state habeas corpus. Lynch never knew there was a difference; he believed at the time that his attorney was doing nothing more than filing a next-level appeal that just happened to be in a federal court instead of a state one. At no time was Lynch informed of any time limits, or any one-bite only opportunities for filing federal or state writs of habeas corpus. Counsel never explained what a habeas corpus was.

During the entire time, from sentencing to completion of his federal habeas corpus, Lynch was held either in jail, or in the restrictive receiving unit of the prison system. Assignment to general population did not come for Mr. Lynch until after the federal habeas corpus route was completed. It was not until this time that Lynch was free to gain access to, and employ, a first-hand knowledge of what rules may have applied to his filings. Until this time, Lynch was dependent upon advice of counsel, and the limits the jail and the receiving unit placed upon his access to legal information. None of these conditions

allowed him to learn of the AEDPA or the other limitations he would be held responsible for.

Following the exhaustion of these claims at the federal circuit appellate level, Lynch filed a state habeas corpus locally in Roanoke Circuit Court.

Claims raised in this petition argued that Lynch should not have had to face a second trial with the same judge who declared a mistrial earlier, the very same judge who held Mr. Lynch in contempt of court. Mr. Lynch argued that as a result of this judicial bias and resulting judicial misconduct, he was denied a fair trial. This was the case especially since this court repeatedly denied Lynch the ability to present the defense of his choice, an affirmative defense to the marijuana cultivation. Mr. Lynch argued also that he should not have been allowed to proceed pro se, that his level of performance in the first trial was so deficient that the court should not have allowed the second trial to proceed with Lynch acting as his own attorney, particularly when the ineptness of Lynch's defense continued into the second trial. The final habeas claim was based on a Virginia statute, which allows for the reduction of the offense level when the marijuana involved in the crime was not grown or offered to another for any compensation or profit. Lynch's case fit this description perfectly. No evidence was given at trial, and no one claimed, that Lynch had ever given the marijuana to anyone for profit or consideration.

This the case, Lynch was eligible to have his felony conviction converted to a misdemeanor. The result applying this exception to Lynch's sentencing would have required that Lynch receive a 90% reduction in his

sentence. But, as Lynch claimed in his habeas corpus petition, neither he (a legal novice), nor his hired attorney (a professional), or the courts, brought this issue up at any time. As a result, the claims went, counsel was constitutionally ineffective at sentencing under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Counsel was also claimed to be ineffective for failing to raise the due process claims and the sixth amendment counsel claims on appeal.

But Lynch's circuit court habeas corpus petition was denied. The Court reasoned that Lynch should not be able to benefit from equitable tolling of the filing date because Lynch had failed to show that he relied upon the advice of another to his detriment in filing. (Revised ORDER denying petition, 09/24/04, Appendix E). Lynch of course took exception to this finding because in fact Lynch had given voluminous evidence on the issue of how he was unfairly hindered from filing properly, all attributable to that of third parties.

Lynch appealed this issue, reasserting his initial claims, to the Virginia Supreme Court and the appeal was denied. (Appendix F).

Lynch then took the issues to the U.S. District Court for the Eastern District of Virginia, Roanoke Divison, asserting that federal constitutional violations occurred in his trial and his sentencing, and that the state court denied him access to the writ of habeas corpus via an unfair assessment of the facts of this case. The federal court, however, did not reach the merits of the claims and instead ruled his petition successive and dismissed the petition without prejudice. (Appendix G).

The issue of the second or successive nature of the §2254 petition was taken to the Fourth Circuit Court of Appeals in two forms: (1) as an appeal of the district court's Order (Record No. 05-7815), and (2) on application to proceed with a second or successive §2254 petition (Record No. 06-0394). The Court of Appeals for the Fourth Circuit denied both filings: the appeal portion was denied on 04/27/06, and the application portion was concluded on 04/28/06 via a denial of the Court to grant the opportunity to file a motion for reconsideration. The Court invoked 28 U.S.C. § 2244(b)(3)(E) and LOCAL RULE 22(d) to accomplish this. (Appendix H).

Lynch followed these actions with a motion in U.S. District Court under Rule 60(b) of the Civil Rule of Procedure. The matter was denied by the District Court; however, appeal of this denial is currently pending before the Fourth Circuit Court of Appeals. (Record No. 06-7223).

SUMMARY OF ARGUMENTS

HABEAS CORPUS PETITIONER WHO IS HELD IN RESTRICTIVE CUSTODY ENVIRONMENT WITH NO ACCESS TO LAW OF HABEAS CORPUS FILING DEADLINES, WHO MUST RELY UPON THIRD PARTY FOR ADVICE AND LEGAL INFORMATION, MUST BE ALLOWED THE BENEFIT OF EQUITABLE TOLLING TO HIS FILING DEADLINE WHEN HE RELIED UPON THIS ERRONEOUS ADVICE TO FILE A LATE PETITION TO HIS DETRIMENT THROUGH NO FAULT OF HIS OWN.

Separating a prisoner from necessary legal materials and essential legal information appears as an unfortunate consequence of a prison or a jail administration's need to create a controlled environment for detaining possibly dangerous individuals. How far, though, can a prison policy go before it goes too far to restrict unnecessarily, needlessly a prisoner's right to access the courts? In this particular case the argument is made that that line was crossed, thus depriving the petitioner of a legitimate right to petition for habeas corpus. The matter is important for this Supreme Court because of the growing number of rejections prisoner petitions receive from courts on mere procedural grounds. Petitioner does not believe that the Congressional intent was to place form over substance by depriving prisoners of access to writs of habeas corpus for mere procedural blunders or mere lack of knowledge of what has become a complex labyrinth of rules post-AEDPA.

During very critical times when necessary filing information was needed by Mr. Lynch, he was held in jail, and later in a prison receiving unit, away from the legal materials he would need to inform himself of time limits and filing requirements for habeas corpus petitions. He was represented by counsel during this time, but was misled and misinformed by the attorney.

The attorney filed the wrong action in the wrong court--at the wrong time. But Lynch knew no better, all Lynch could do is rely upon his attorney to advise him of what to do. But for this reliance upon counsel, and Lynch's forced reliance on jailers and prison operators to provide him access to essential legal information, Lynch would have filed timely and properly.

But after all was done, Lynch was held responsible for his attorney's error. Lynch was the only person forced to accept the responsibility for these errors, yet it was Lynch who was held in restrictive jail or prison custody the entire time.

The State Limitations

Under Virginia common law a statutory time limitation can be tolled if the applicant shows by "clear and precise and unequivocal evidence that he relied to his detriment upon an act or statement of the other part to refrain from taking action within the required statutory period." Finnerty v. Thornton Hall, Inc., 42 Va.App. 628, 640 (2004).

Lynch provided exactly this evidence as required under Virginia law. Yet the Virginia court denied Lynch equitable tolling. This Supreme Court held in the case of Lee v. Kemna, 534 U.S. 362 (2002) that an accused's imperfect, but substantial compliance with court rules would not be an adequate state ground to bar federal habeas corpus review. (Id. at 366-367). The same advantage should have been offered to Lynch in his second federal §2254 filing: before drawing the conclusion that the petition was successive and then dismissing the petition, the court should have looked to the merits of the claims, questioned whether "cause" could be employed to excuse the first filing, and it should have granted the writ. United States v. Frady, 456 U.S. 152 (1986).

The federal court should have recognized that the state court had violated Lynch's Fourteenth Amendment Due Process rights in denying the chronologically second,

but for AEDPA purposes a first, petition since the argument was made out in the court documents.

The Federal Limitations

In this case the petitioner made it very clear in his memorandum in support of his §2254 petition that he was hindered by state action from knowing about the AEDPA time limitations or the AEDPA one opportunity for filing a petition before the expiration of that time, or before the first petition had already been filed by counsel.

Under federal law, equitable tolling would apply to allow for a delayed petition once "cause" for the delay was established. The Fifth Circuit has found in at least one instance that state created impediment, by virtue of limiting an inmate's access to pertinent AEDPA limitations information, could support "cause" to at least require the court to find specially whether or not in fact the petitioner "was aware of the existence of AEDPA prior to the expiration of the one-year limitation period." 28 U.S.C. § 2244(d)(1)(B); Egerton v. Cockrell, 334 F.3d 433, 437 (5th Cir. 2003).

Although the Egerton case was limited to the time limitations aspect of the AEDPA, the parallel exists also if the lack of knowledge issue turns on whether or not a petitioner was aware that he could only file one, and only one, petition. This becomes particularly important when the petitioner's counsel filed a wrong petition in the wrong court, all while the client was unaware of existing law.

Moreover, "cause" could draw from attorney error even when no constitutional right to counsel exists. In Simmons v. Lockhard, 915 F.2d 372, 376 (8th Cir. 1990),

that court found "cause" for a procedural default to exist even when no "right" to counsel exists. Here, counsel was also part of the "impediment" to Lynch's properly filed petition.

For the reasons stated, Mr. Lynch should not have had his chronologically second petition automatically relegated to that of a second for AEDPA purposes, but first the court should have made findings specially as to whether Mr. Lynch had genuinely been denied this important AEDPA knowledge through state created impediment and third party error through counsel.

THE DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT COUNSEL RIGHTS VIOLATED WHEN THE TRIAL COURT ALLOWED THE DEFENDANT TO DEFEND HIMSELF AT TRIAL WHEN DEFENDANT HAD ALREADY DEMONSTRATED INCOMPETENCE IN THIS CAPACITY BEFORE THE COURT IN EARLIER MISTRIAL.

The significance of this issue is of national importance in the court's understanding of where exactly the line should be drawn between a defendant's right to act as his own counsel in a criminal trial versus what is an alternative right to counsel for the defense guaranteed by the Sixth Amendment.

Mr. Lynch acted to represent himself in both the first mistrial, and the second completed trial. In both cases the record is clear to show his utter incompetence in pursuing his defense. The court would have been aware of this fact in spite of Mr. Lynch's willingness to pursue self-representation.

This Court found in Faretta v. California, 422 U.S. 806, 821 (1975) that an accused has a Sixth Amendment right to conduct his own defense. Juxtaposed with this "right" this Court has found in Martinez v. Court of Appeals of California, 528 U.S. 152, 160 (2000), that a criminal appellant has no right to represent himself on appeal. The reasoning offered for not granting a liberal right to self-representation on appeal is the growing complex maze of rules existing in today's jurisprudence. This petition asks this Supreme Court to now answer whether, under todays growing complexity of rules in trials also: Does an accused's "right to self-representation" trump the accused's right to counsel under the Sixth Amendment when the accused has already demonstrated to the court in an earlier mistrial that he is unable to manage the complexities of the task? In agreeing with the Solicitor General's position, this Court held "that the 'test [for competence] must be whether [the accused] has sufficient present ability to consult with his Lawyer with a reasonable degree of rationalunderstanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" Dusky v. United States, 362 U.S. 402 (1960)(per curium).

In dissent of the Godinez holding, Justice Blackmun wrote that, "It is axiomatic by now that criminal prosecution of an incompetent defendant offends the Due Process Clause of the Fourteenth Amendment." Godinez v. Moran, 509 U.S. 389,412 (1993)(J. Blackmun, dissenting). Justice Blackmun noted that he did not disagree with the Court's majority on the standard employed to determine competency to stand trial. Justice Blackmun disagreed with the majority, however, in its

finding that the same standard should apply to one who waives counsel and proceeds to represent himself in a criminal trial. Id. at 412. In the dissenting view, the competency evaluation should not be irrelevant to the nature of the particular proceeding; but instead, tailored specially to the "context and purpose of a proceeding. Id. at 413.

There is no doubt that in today's trials the technical knowledge required to competently defend or prosecute a criminal case has increased. As this Court has pointed out in Martinez: "[e]ven at the trial level... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez v. Court of App. of Cal., 528 U.S. 152, 162 (2000). In this case the defendant consistently displayed poor judgment and general ineptness in planning and carrying out his defense. In large part the first trial was declared a mistrial specifically because of Mr. Lynch's ineptitude. In this instance to allow the trial to continue was a travesty of justice that should never have been allowed because Mr. Lynch truly lacked the fundamental rationale of his prosecution as well as any factual understanding of the proceedings against him. In cases such as this, in these times of ever more complex rules and science employed in criminal trials, would not the logic of Martinez deserve revisiting to consider where, exactly, the line should be drawn between a defendant's right to defend himself and the right to counsel?

UPON DECLARATION OF MISTRIAL, JUDGE SHOULD HAVE RECUSED IN SECOND TRIAL WHEN BASIS FOR MISTRIAL WAS ANIMOSITY BETWEEN DEFENDANT AND JUDGE.

Should this Court allow Mr. Lynch's petition to proceed, another substantive claim that he has already presented below rests with his claim that his due process right to a fair trial was denied to him by the trial court. He asserts that a criminal defendant retains the right under the 14th Amendment to a fair trial as a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955). By the court's obstinent refusal to allow the defendant to present the defense of his choice, the court denied Lynch the fair trial he deserved. ("THE COURT: That is an argument that cannot be made. You cannot argue to the jury that you should not be convicted because the law is wrong. T.Trans. 02/06/01 at 5. "All right, and if that argument is made to the Jury, I would certainly declare a mistrial." Id. at 6).

CRIMINAL DEFENDANTS SHOULD BE ALLOWED TO PRESENT THE DEFENSE OF THEIR CHOICE.

In, agreeing with the Solicitor General's position, this Supreme Court held "that the 'test [for competence] must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'" Dusky v. United States, 362 U.S. 402 (1960)(per curium).

In the dissent of the Godinez majority, Justice Blackmon wrote that, "It is axiomatic by now that criminal prosecution of the incompetent defendant offends the Due Process Clause of the Fourteenth Amendment." Godinez v. Moran, 509 U.S. 389, 412 (1993)(J. Blackmon, dissenting). Justice Blackmon noted

that he did not disagree with this Court's majority on the standard employed to determine competency to stand trial, but he did disagree that this same standard would be useful in determining the competency of a defendant who elects to represent himself at trial. Id. at 412. Contrary to the majority view, the dissent argued that the competency evaluation should not be irrelevant to the nature of the particular proceeding; but instead, tailored specially to the "context and purpose of [that] proceeding." Id. at 413.

In today's trial the technical knowledge required to competently defend or prosecute a criminal case has increased. As this Court pointed out in Martinez: "Even at the trial level ... the government's interest in ensuring the integrity and efficiency of the trial outweighs the defendant's interest in acting as his own lawyer." Martinez v. Court of App. of Cal., 528 U.S. 152, 162 (2000).

In this case the defendant has already had one trial declared a mistrial due in large part to his inability to conduct himself properly. At the second trial the conduct didn't change, the court simply allowed the case to proceed because it had already one mistrial in the past and resisted going there again. The trial proceeded anyway in this case, despite the defendant's obvious ineptness, and incompetence. It would have been clear to the court that Mr. Lynch lacked the "rational as well as the factual understanding of the proceedings against him", yet because a higher standard of competence did not exist to block this travesty, the trial proceeded anyway.

In these times of ever more complexity of trials, does not the standard need revision? This Court did state in Martinez, that there were circumstances when the right to self representation could be outweighed to "ensure the integrity and efficiency of the trial"'. , and asserted too that "historical evidence relied upon by Faretta," identifying a right to self-representation may be outdated. Martinez, supra, 528 U.S. at 156. This Court stated that historically, a "self-representation was the only feasible alternative to asserting no defense at all", id. at 157. But today this need not be the case; moreover, the need for counsel should trump the right to defend one's self unless the defendant is able to meet a higher standard of competence, one matched to the level of competence equal to the demands of the task, and more than the one merely used to determine one's ability to stand trial.

In Virginia, the Legislature has acknowledged that at least in capital cases, the need for two lawyers exists to ensure a fair trial. Virginia Code § § 19.2-163.7)(amended 2004)("In any case in which an indigent defendant is charged with a capital offense, the judge ... shall appoint at least two attorneys.... "). It is now a good time to revisit the very important issue, to reconsider the dissent in Godinez, and the dissent in Faretta for relevancy in light of the increased complexity of today's trials. See, Godinez vs Moran, 509 U.S. 389, 409-417, (1993)(JJ. Beckman, Stevens, dissenting), and see, Faretta v. California, 422 U.S. 806, 836-852 (1975)(C.J. Burger, and J. Blackmun, and J. Rehnquist, dissenting).

UPON DECLARATION OF MISTRIAL, TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF IN SECOND TRIAL WHEN BASIS FOR MISTRIAL WAS

INCOMPETENCE OF DEFENDANT IN SELF-REPRESENTATION AND ANIMOSITY BETWEEN DEFENDANT AND JUDGE.

This Supreme Court has also acknowledged that "early precedent demonstrates" that the "right" to self-representation does not always work to aid a defense, that there is precedent to support the argument that the right was not always "used to the defendant's advantage as a shield, but rather was often employed by the prosecution as a sword." Martinez v. Court of App. of Cal., 528 U.S. 152, 157 (2000).

Petitioner Lynch had already demonstrated his incompetence to handle the trial process. The trial court declared a mistrial because of this demonstration. Courts can, under current law, terminate self-representation if the defendant does not demonstrate a willingness to abide by the rules of procedure or courtroom protocol. McKaskle v. Wiggins, 465 U.S. 173 (1984). This court elected not to revoke the defendant's self-representation, but instead chose to allow the trial to continue. In this case the court, not necessarily the prosecution, employed the "right" to self-representation as a sword to allow the defendant to essentially self-destruct in the courtroom.

The same judge declared a mistrial. The same judge held the defendant in contempt and sentenced him to ten days in jail. That same judge later presided over the second trial, and it was this same judge that allowed the defendant to proceed with a self-representation defense. Bias of this judge was alleged from the beginning, and each and every motion for recusal was denied. Moreover, the court persisted in its actions to undermine any defense that even this layperson could

muster. The court denied the defense a defense in the affirmative by showing that no renumeration or compensation was given in return for the marijuana, a defense that would have converted the offense to a misdemeanor from a felony, the court frustrated the defendant's efforts to present a defense of medicinal use, flatly disallowing this route. (See, T.Trans. of 02/06/01 at 5: "THE COURT: That is an argument that cannot be made. You cannot argue to the jury that you should not be convicted because the law is wrong").

Should this Court allow Mr. Lynch's petition to proceed, this substantive claim would be brought forward alleging an outrageous abuse of judicial authority in this case and where clear miscarriage of justice has occurred.

A DEFENDANT WHO IS DENIED A DEFENSE OF CHOICE DENIED A FAIR TRIAL, AND HE IS DENIED A TRIAL BEFORE AN IMPARTIAL JURY.

The guarantee to a state criminal defendant of a fair trial by an impartial jury extends through the United States Constitution through the Sixth and the Fourteenth Amendments. Irvin v. Dowd, 366 U.S. 717 (1960); In re Murchison, 349 U.S. 133, 136 (1955)("A fair trial in a fair tribunal is a basic requirement of due process"). Petitioner was denied these rights.

In Virginia the defense of accommodation is accepted. (See, Virginia Code § 18.2-248.1, "If [a] person proves that he gave [] marijuana only as an accommodation...and not with intent to profit thereby...he shall be guilty of a Class 1 misdemeanor").

The court would not allow this defense and as a result the defendant's substantive rights were denied.

Second, the court would not allow the defendant the defense of medicinal use. Currently, eleven states allow the medicinal use of marijuana. A defense of this is of national concern. A defense of this is also a defense of choice; the trial court would not allow this depriving the defense of the defense of choice. In this area too depriving the defense of its rights under the Sixth and Fourteenth Amendment.

ATTORNEY FOR THE DEFENSE AT SENTENCING AND ON APPEAL WAS INEFFECTIVE.

Petitioner will argue under Strickland v. Washington, 466 U.S. 668 (1984), that counsel in both instances of sentencing and on direct appeal provided ineffective assistance of counsel under the Sixth Amendment. He refrains from placing the argument in the forefront to this juncture because the law is in fact settled and satisfactory with regard to the two-prong test enunciated in Strickland.

CONCLUSION

The implications of allowing this conviction stand, and the denial of Petitioners' habeas corpus, to remain in place are ominous for those who must in their best efforts follow the rules of courts and the law. But through no fault of their own, many criminally convicted are denied legitimate access to habeas corpus by state action through a system-wide manipulation of the rules. This manipulation, by detaining individuals in isolated pockets

until their time lapses to file under the current stringent rules is fundamentally unfair. In these case tolling is required to satisfy the promise that the writ of habeas corpus will not be suspended.

This Court is also called upon to resolve an issue of national concern to improve the fair and just operation of the courts, by setting a higher bar to those who act as their own counsel. For too long the Court has remained silent against the abuse of lower trial courts denying defendant a fair trial by, again, manipulation of the rules. A criminal defendant should not have to face two prosecutors. Petitioner asks that this Court remove the judge from this imbalance and replace the judge fairly in the middle of the balance where he, or she, belongs.

Petitioner respectfully submits that the Writ should be granted.

RESPECTFULLY SUBMITTED,

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